Ontario Fair Tax Commission
Tax Treatment of Real Estate Gains Working Group

Discussion Paper
Phase #1 of Workplan

The Nature of Land and Housing:
Basic Philosophical Issues

by J. David Hulchanski, Professor
Faculty of Social Work, University of Toronto
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1. Equity

Questions about fair taxes are based on some definition of what is "fair." Value judgements are required. Most would agree that a good society is one which continually seeks to achieve greater fairness -- greater equity. But what does this mean?

Equity is a widely used term with connotations that suggest ideals of fairness and justice. Public policies and private investment decisions can be made in ways which reduce disparities between the rich and poor or in ways that increase disparities. They can also be made in ways which reduce or enhance the quality of life and life opportunities for some individuals and groups. To seek greater equity in the outcomes of these decisions is to seek a healthier, more sustainable community with an improved quality of life for all. Greater equity means a more compassionate society, one in which extreme poverty and homelessness is not juxtaposed with luxury and conspicuous consumption.

Equity is often incorrectly used as a synonym for equality. Equity calls for equal treatment of equals and the unequal treatment of unequals. Equity does not arise when everyone is treated equally regardless of circumstances or contribution but when everyone is treated *fairly* and with *justice*. An unequal distribution of a certain good or service may be fair and just if, for example, it is distributed on the basis of need and to redress existing inequities and injustices. In a geographic context, equity in distribution among areas is achieved if any departures from equality are based on accepted definitions of need and entitlement. A progressive tax system seeks to achieve equity, which may or may not mean equality.

How does equity relate to efficiency and effectiveness? The following quote from a book about how public officials set priorities makes a helpful distinction between the important goals of efficiency, effectiveness, and equity.

> "Equity, in my view, should be used to expand the discussion of public services to which efficiency and effectiveness concepts contribute. Just as concern whether public services are efficient (provided at least cost) and effective (achieve the results sought) is important, so too is concern with services being equitable (fair) in their distribution." (Lucy 1988, 183

For the task of the Working Group, the words "public services" can be replaced by "the tax system" in the above quote.

There can be no simple commitment to equity. We must instead talk about defined types of equity in relation to particular goods or services or taxes, and particular sets of persons (young/old, tenants/homeowners, rich/poor). In doing so, we are implicitly raising value and justification issues in policy decision making. The principle of equity is a demand for the impact of policies to be systematised. Equity arguments are often used in cases such as the tax system where questions are raised about one social group being benefited relative to another. According to Weale (1978, p.28):

> "The point of an equity argument is not so much to stress the concept of consistency, but rather to indicate the proper reference groups between whom consistency should be maintained. The normal method for arguing is to say that one group should be better treated than it is because another group like it in relevant respects receives better treatment. Why is there a need for such arguments? The explanation is to be found in those situations in which a variety of policies have been followed, all of which have similar objectives but which affect different groups."

Ontario's tax system is a case in which a variety of policy objectives have been attached by revising the tax code from time-to-time. Are the intended and unintended outcome of these incremental changes equitable? In particular, is the current tax structure as it relates to land, housing and real estate in general, equitable?

Separate from, but related to, equity considerations as outlined above, is a question about the role of the tax system in helping to achieve social policy and housing objectives? To what extent should the tax system be used to help achieve societal equity objectives, other than to generate revenue for government in an efficient and effective manner? Some might argue that the tax system should not be used as a policy instrument beyond generating government revenue. Others would argue that equity considerations are the very essence of the tax system, whether we choose to admit it or not. The fact is, however, the use of the tax system for achieving goals other than revenue generation is now widespread. For example, taxes are being used in Canada to achieve health objectives (e.g., the tax on cigarettes), environmental objectives (e.g., taxes relating to pollution and non-recyclable containers), economic investment objectives (e.g., the various exemptions intended as incentives for certain sectors of the economy). There is an extensive mix of revenue generation objectives and other public policy objectives in the tax system.

2. The Nature of Land

Is land a commodity like most goods and services or is there something which sets land apart? Economists have long debated the question of whether land is a unique resource. Some argue that land is a unique resource in that it is the necessary setting for all aspects of human life, that it is largely irreplaceable, that its supply is virtually fixed, and so on (e.g., Alterman 1982; Strong 1981). Others have countered that land is not a unique resource, arguing that through more intensive use and improvements in technology its supply can in effect be increased and that it is not unique in other ways as well (e.g., Bracewell-Milnes 1974; Smith & Walker 1977).

The 1976 United Nations Conference on Human Settlements (Habitat '76) in Vancouver added fuel to the philosophical and political debate over land by asserting that land "cannot be treated as an ordinary asset, controlled by individuals and subject to the pressures and inefficiencies of the market ... the pattern of land use should be determined by the *long-term* interest of the community." (United Nations 1976, p.61) The 131 nations participating in the Conference adopted a resolution calling for much greater public regulation, taxation and ownership of land. Recommendation D.3 stated:

> "(a) Excessive profits resulting from the increase in land value due to development and change in use are one of the principal causes of the concentration of wealth in private hands. Taxation should not be seen only as a source of revenue for the community but also as a powerful tool to encourage development of desirable locations, to exercise a controlling effect on the land market and to redistribute to the public at large the benefits of the unearned increase in land values.
>
> "(b) The unearned increment resulting from the rise in land values resulting from change in use of land, from public investment or decision or due to the general growth of the community must be subject to appropriate recapture by public bodies (the community), unless the situation calls for other additional measures such as new patterns of ownership, the general acquisition of land by public bodies."

To implement this recommendation, a list of "Specific ways and means" was provided. One of these referred explicitly to taxes:

> "(i) Levying of appropriate taxes, e.g., capital gains taxes, land taxes and betterment charges, and particularly taxes on unused or under-utilized land."

Any policies affecting land are bound to be controversial. "A country's land policy," according to one writer on the subject, "is often an excellent mirror for some of its most basic social values and ideologies." (Alterman 1982, p.1) Land policy generally refers to the

relationship between a private person's rights and obligations in the use of land and the public policies pertaining to them. The controversies regarding land policy often reflect more wide-ranging social values. One such fundamental social value relates to the questions of rights.

3. Rights: Property Rights and The Right to Housing

The concept of a right acts as a convenient theoretical link between the justification of a certain set of institutions (e.g., the tax system) and the evaluation of the practices within those institutions (e.g., the actual efficiency, effectiveness and equity of specific taxes).
Theories of political morality recognize requirements of various sorts, to perform or refrain from certain acts in certain circumstances. The language of "rights" is reserved in political discourse for those interests and considerations that have *special* importance, an importance which would warrant overriding other values and ideals whenever they conflict with the protection of rights.

Rights are often *enshrined* in constitutions or other important documents. Since World War II these also include international agreements, starting with the United Nations Charter and the Universal Declaration of Human Rights. There are also rights which are asserted and claimed by some which are not formally enshrined. This is the case in Canada with the two rights often raised with respect to the real estate issues the Working Group is dealing with: claims by some and denials by others about *property rights* and *housing rights.* It is helpful to understanding the different views relating to these claimed rights because one's position affects policy recommendations.

3.1 Property Rights

One often hears the claim that property rights are being eroded. Property here refers almost exclusively to real estate. According to a study by the Ontario Real Estate Association, for example, "property rights are being eroded at an ever-increasing pace" due to an unabated "avalanche of legislation that affects the citizen's property rights." (Oosterhoof & Rayner 1979, pp. v, ix)

This view is based on a strongly held belief that private property is essential to individual freedom and democratic government and that government interference with property rights is a step towards despotism. This attitude can be traced back to the Magna Charta which guaranteed that "no freeman shall be ... deprived of his freehold [private property] ... unless by the lawful judgment of his peers and by the law of the land." Centuries later the U.S. Bill of Rights proclaimed: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without a just compensation."

Not everyone agrees that property rights are being eroded. Some do not even recognize property rights as a legitimate distinctive category of rights for society to respect and, as a

result, oppose enshrining this category of claim in Canada's constitution. This view is based on the position that there is not a special defined set of property rights which is ideal and that any changes in the set of rights associated with owning property (real estate) is not necessarily a step backwards (an "erosion").

Where do "rights" in relation to property come from? In the case of the controversy over landlord/tenant legislation, for example, it is often claimed that "a substantial transfer of property rights from landlords to tenants" is involved. (Ontario, Ministry of Municipal Affairs and Housing 1982, p.142) But as Makuch and Weinrib (1985, p.6) point out, "that statement presupposes a proper legal allocation of rights between landlords and tenants rather than a socially achieved consensus of what those rights should be." Rights, whether they are human rights or property rights, can only be established politically.

There are well recognized rights to property in Canada, though they are not constitutionally enshrined. These are socially defined bundles of rights bestowed by laws and regulations on owners of real estate, providing the owner with certain decision making authority over real estate. It is this bundle of rights which in sum add up to "property." This is why "property rights" is so controversial. The bundle is socially defined by past and present legislation and society is continually adjusting what it defines to be the bundle of rights associated with owning real estate. As political theorist C.B. Macpherson (1978, p.1) points out, the "actual institution [property], and the way people see it, and hence the meaning they give the word, all change overtime." As Denman (1978, p.3) points out, property rights are "the creation of positive law whatever social or political theory may presuppose about their metaphysical origins in the natural or supernatural order of things." Legislatures, he notes, "can give and take, allocate and reallocate titles to them." As a result, the meaning of property is not constant.

In terms of the task of the Working Group, the above means that certain recommendations for revised or for new forms of taxes affecting real estate will likely be seen by some as a further erosion of property rights which should be opposed, while others will view it as simply a positive change in the tax system with no bearing on the claimed rights associated with property in Ontario. Some will argue that increased use of land taxes is necessary because "the distribution of benefits from current methods of urban and other growth and development are inequitable" (Kehoe *et al.* 1976, p.35), while others will argue that "if a redistribution of wealth is desired it should be done in such a way as to minimize its effects on the efficiency of the economy, and that is accomplished by policies that redistribute wealth directly, and not indirectly through policies such as increased intervention in land markets." (Smith & Walker 1977, p.xxiii)

3.2 The Right to Housing

While some individuals and groups will struggle to assert and defend property rights, others will, with equal vigour, assert and defend housing as a fundamental human right. In this view, use of the tax system or other government authority to ensure greater access, or indeed

legally guaranteed universal access, to appropriate and adequate housing is acceptable and overrides all claims to property rights.

While it is easy to recognize that all people require housing, it is difficult for some to recognize this requirement as a right.

The first international legal recognition of housing as a fundamental human right was made in December 1948 when the members of the United Nations adopted the Universal Declaration of Human Rights. Article 25(1) refers specifically to housing:

> "Everyone has the right to a standard of living adequate for health and well-being....including food, clothing, housing, and medical care and necessary social services."

In 1966 the international community further recognized the claim to housing as a right when the U.N. adopted the International Covenant on Economic, Social, and Cultural Rights. Article 11 states that the countries signing the Covenant "recognize the right of everyone to an adequate standard of living...including...housing." (Leckie, 1989)

Though Canada ratified this and other similar human rights covenants, the right to housing is not enshrined. From time-to-time, however, the right has been asserted by senior government officials. The minister responsible for housing told the housing of Commons, in explaining the 1973 amendments to the National Housing Act, that:

> "Good housing at reasonable cost is a social right of every citizen of this country.... [This] must be our objective, our obligation, and our goal."

There are many who claim that housing is not a right and that the entire category of social and economic rights contained in the Universal Declaration are different in nature from the traditional civil and political rights and, as such, are an inappropriate debasement of the language of rights. As Block (1989, p.30-31) explains,

> "Of late, however, a new type of 'right' has arisen.... What is claimed here is not the right to be left alone, free to build, buy or rent whatever shelter one can afford. Now demanded is a right to housing which implies an obligation on the part of other people to provide it. This claim, in other words, is for a so-called positive right, not the negative rights of classical origin. But what is actually at stake here has nothing to do with rights at all. On the contrary, it is a disguised, and therefore quite insidious, demand for wealth."

Few political theorists and legal philosophers consider the distinction between negative and positive, old and new, or classical and modern rights, as legitimate. Waldron (1984) notes, for example, that: "Few now take seriously the suggestion, quite common a few decades ago,

that recognition of the so-called socioeconomic rights ... is a category mistake or a debasement of the language of rights."

Macpherson argues that a false distinction has developed between property rights and human rights in general. The social and economic rights, which includes the right to housing, are, he argues, part of an individual's property rights. We need to "restore the original liberal meaning of property, as when Locke and his contemporaries spoke of a property in one's person, one's life and liberty, as well as one's worldly goods." (Macpherson 1987, pp. 32-33) In his view "property rights" not only include real estate but also much more. The "old" and the "new" categories of rights are the same: "all that has changed is the acceptable view of possible ways of securing the individual right to the material means of a fully human life."

Many people in Ontario do not have access at all to housing (the homeless) while many others are inadequately housed and find that they cannot afford good quality housing appropriate to their needs (e.g., the size of their family). The question here is whether government can play a role in the real estate sector via new or revised taxes to help achieve greater access to appropriate housing in the province.

What does the "right to housing" mean? To be enforceable, a specific definition of minimum housing standards everyone ought to have access to must be developed. Leckie point out that:

> "When defining 'housing rights,' there are obvious criteria relating to adequate quality such as a safe site and structure, basic infrastructure and services, ... secure tenure and affordable cost. But there are also issues relating to location and the issue of 'participation' -- people's right to influence developments in their homes and neighbourhoods." (1989a, p.98)

The debate over housing rights, like the debate over property rights, comes down to a set of ethical questions. There is no scientific way to arrive at an answer. The answer, however, helps define the role of government in the real estate sector.

4. The Role of Government

There are three basic views about what the role of government ought to be in the real estate market:

- land and housing markets should be allowed to operate with little or no intervention;
- there is a role for government in setting standards, providing subsidies, regulating aspects of supply (e.g., zoning and planning), directly providing housing to meet social needs, with private market dynamics otherwise free within these constraints; and

- there should be a much more comprehensive role for government in land and housing markets, allowing greater achievement of social equity objectives through regulation and taxation of real estate. (Lansley 1979, p.18)

There has been a great deal of intervention into land and housing markets. Ontario's record during recent decades places the province between the second and third categories, though there are many who argue that more problems are caused than are solved by this pervasive intervention.
There seem to be two basic rationales for government intervention: the perceived need to correct failings in the market place; and the desire to achieve certain social objectives.

The first rationale refers to the market's failure to be allocatively "efficient" in terms of supply and demand aspects of land and housing as market commodities. The second rationale refers to the political decision made in a democracy to achieve certain social objectives even if this means making a trade-off with what some would consider to be the efficient operation of the market.

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